

08-31-07

3761

U.S.P.S. EXPRESS MAIL "POST OFFICE TO ADDRESSEE" SERVICE
DEPOSIT INFORMATION

Express Mail Label No.: EV 106 891 524 US

Date of Deposit: August 30, 2007

BRINKS
HOFER
GILSON
& LIONE

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Appln. of: ZANDER et al.

Appln. No.: 10/749,871

Filed: December 30, 2003

For: VISUALLY COORDINATED
ABSORBENT PRODUCT

Examiner: Hand, Melanie Jo

Art Unit: 3761

Attorney Docket No: 659-2080

Client Ref. No.: (K-C 19,996)

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

TRANSMITTAL

Sir:

Attached is/are:

- ☒ Appellant's Reply Brief (12 pgs.).
☒ Return Receipt Postcard.

Fee calculation:

- ☒ No additional fee is required.
☐ Small Entity.
☐ An extension fee in an amount of \$_____ for a _____-month extension of time under 37 C.F.R. § 1.136(a).
☐ A petition or processing fee in an amount of \$_____ under 37 C.F.R. § 1.17(____).
☐ An additional filing fee has been calculated as shown below:

	Claims Remaining After Amendment		Highest No. Previously Paid For	Present Extra	Small Entity		or	Not a Small Entity	
					Rate	Add'l Fee		Rate	Add'l Fee
Total		Minus			x \$25=			x \$50=	
Indep.		Minus			x100=			x \$200=	
First Presentation of Multiple Dep. Claim					+\$180=			+\$360=	
					Total	\$		Total	\$

Fee payment:

- ☐ A check in the amount of \$_____ is enclosed.
☐ Please charge Deposit Account No. 23-1925 in the amount of \$_____. A copy of this Transmittal is enclosed for this purpose.
☐ Payment by credit card in the amount of \$_____ (Form PTO-2038 is attached).
☒ The Director is hereby authorized to charge payment of any additional filing fees required under 37 CFR § 1.16 and any patent application processing fees under 37 CFR § 1.17 associated with this paper (including any extension fee required to ensure that this paper is timely filed), or to credit any overpayment, to Deposit Account No. 23-1925.

Respectfully submitted,


Andrew D. Stover (Reg. No. 38,629)

August 30, 2007
Date

BRINKS
HOFER
GILSON
& LIONE

BRINKS HOFER GILSON & LIONE
NBC Tower - Suite 3600, 455 N. Cityfront Plaza Drive, Chicago, IL 60611-5599

"Express Mail" mailing label number EV 106 891 524 US

BRINKS
HOFER
GILSON
& LIONE

Date of Deposit: August 30, 2007



Our Case No. 659/2080
K-C Ref. No. 19,996

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:

Zander, et al.

Serial No.: 10/749,871

Filing Date: December 30, 2003

For: VISUALLY COORDINATED
ABSORBENT PRODUCT

Examiner: Hand, Melanie Jo

Group Art Unit No.: 3761

APPELLANTS' REPLY BRIEF

MS APPEAL BRIEF - PATENTS
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

Pursuant to 37 CFR 41.41 and in response to a first Examiner's Answer mailed July 2, 2007, Applicants respectfully request entry of the present Reply Brief.

NEW GROUNDS OF REJECTION

The Examiner's Answer includes a new ground of rejection of claim 22. In particular, the Examiner has now rejected claim 22 under 35 U.S.C. 103 as being made obvious over U.S. Patent Application Publication No. US 2002/0148749 to Briseboi, rather than under 35 U.S.C. 102 as being anticipated by Briseboi, as previously asserted. Applicants gratefully acknowledge the Examiner's statement that Appellant's arguments with respect to the rejection of claim 22 under 35 U.S.C. 102 have been fully considered and are deemed persuasive (Answer at 19), thereby precipitating the new grounds of rejection.¹

Pursuant to 37 C.F.R. 41.39 (b)(2), Applicants hereby request that the Appeal be maintained. Applicants have provided sections entitled Status of Claims, Grounds of Rejections To Be Reviewed On Appeal, and Argument (*see* 37 C.F.R. 41.39(b)(2); MPEP 1207.03).

STATUS OF CLAIMS

The status of claims has not changed. In particular, claims 1, 3-18 and 20-24 are pending in the above-referenced application. Applicants previously cancelled claims 2 and 19. Claims 1, 3-18 and 20-24 (*see* Appellants' Brief at Appendix A) have been rejected and are all being appealed.

¹ Applicants respectfully disagree with the Examiner's assertion that the new grounds of rejection of claim 22 was introduced "solely to address appellant's remarks, page 25-27, which are newly presented" (Answer at 14). Applicants previously made similar arguments in an Amendment and Reply to January 12, 2006 Office Action filed May 15, 2006 (*see* page 14).

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

Whether claims 1, 11-13 and 15 are unpatentable as being made obvious over U.S. Patent No. 6,601,705 to Molina in view of U.S. Patent No. 6,520,330 to Batra and International Publication No. WO 02/30347 to Farris.

Whether claims 3 and 4 are unpatentable as being made obvious over Molina in view of Batra and Farris.

Whether claims 5-10 and 24 are unpatentable as being made obvious over Molina in view of Batra and Farris.

Whether claim 14 is unpatentable under 35 U.S.C. 103 as being made obvious over Molina in view of Batra and U.S. Patent Application Publication No. US 2002/0148749 to Briseboi.

Whether claim 14 is unpatentable under 35 U.S.C. 103 as being made obvious over Briseboi in view of Batra.

Whether claim 16 is unpatentable under 35 U.S.C. 103 as being made obvious over Briseboi in view of Batra and U.S. Patent No. 6,802,833 to Kudo.

Whether claim 16 is unpatentable under 35 U.S.C. 103 as being made obvious over Molina in view of Batra and Kudo.

Whether claim 17 is unpatentable under 35 U.S.C. 103 as being made obvious over Briseboi in view of Batra and Kudo.

Whether claim 17 is unpatentable under 35 U.S.C. 103 as being made obvious over Molina in view of Batra and Kudo.

Whether claim 23 is unpatentable under 35 U.S.C. 103 as being made obvious over Briseboi in view of Batra and Kudo.

Whether claim 23 is unpatentable under 35 U.S.C. 103 as being made obvious over Molina in view of Batra and Kudo.

Whether claims 18 and 21 are unpatentable under 35 U.S.C. 103 as being made obvious over Briseboi in view of Batra.

Whether claim 20 is unpatentable under 35 U.S.C. 103 as being made obvious over Briseboi in view of Batra.

Whether claim 22 is unpatentable under 35 U.S.C. 103 as being made obvious over Briseboi.

ARGUMENT

(1) Claim 22 is Not Obvious over U.S. Patent Application Publication No. US 2002/0148749 to Briseboi

Claim 22 recites “a first packaging component having at least first and second visual characteristics, wherein said product component is disposed in said first packaging component, *wherein said first packaging component comprises a wrapper element having said first visual characteristic and a fastening element having said second visual characteristic*; and a second packaging component having said at least said first and second visual characteristics, wherein said first packaging component is disposed in said second packaging component.”

The Examiner now admits that Briseboi “does not teach that the first packaging component has a wrapper element with a first visual characteristic (e.g. 106 or 108) and that the fastening element has said second visual characteristic” (Answer at 4), and has therefore withdrawn the prior rejection under 35 U.S.C. 102 (Answer at 19). Instead, the Examiner now asserts that Briseboi teaches that the first and second characteristics “build upon one another to provide a complete set of information about the product . . . , provide information in their own rights as stand alone characteristics, and are not redundant,” such that it would have been obvious to one of ordinary skill in the art to modify the article of Briseboi to provide the wrapper element with a first characteristic and the fastening element with a second characteristic (Answer at 4). Applicants respectfully disagree.

In particular, Applicants first submit that the “scale of reference” 106 of Briseboi would never be used separately from the “pointer” 108, which defines a “position, level or

degree on the scale of reference 106” (Briseboi at para. 37). Indeed, without the pointer 108, the scale of reference 106 is meaningless to the user.

Moreover, one of ordinary skill in the art would not be led to separate the icon (wave mark) from the corresponding text (e.g., moderate), let alone put one on a substrate 722 and the other on the pouch 310 (Briseboi at FIG. 7; paras. 45-48). Indeed, such separation would require two separate application steps during manufacture, thereby increasing the cost and complexity of the system and device with no apparent advantage. Simply put, there is no reason for one of ordinary skill in the art to make such a modification.

Moreover, Briseboi discloses that the indicia are provided on the substrate 722, such that it can be peeled off to form a reminder tag 723 (Briseboi at para. 47). The consumer then compares the reminder tag 723 with a receptacle 102 at the store, such that the consumer can “easily identify the type of sanitary napkin the user normally purchases, without the need of remembering the details such as the particular brand, absorption characteristics, configuration, materials used in the construction of the sanitary napkin, etc.” (Briseboi at para. 48). As such, Briseboi teaches the importance of maintaining the information on the reminder tag 723, rather than on a wrapper 310, which is discarded by the consumer. As such, there is no reason for one of ordinary skill in the art to modify Briseboi to separate the information on the substrate 722 and the pouch 310.

For at least these reasons, the Examiner’s rejection of claim 22 should be withdrawn.

(2) Remarks About the Examiner’s Response to Argument

The Examiner’s arguments concerning claims 1, 3-18, 21, 23 and 24 set forth at pages 5-14 of the Examiner’s Answer are essentially identical to those presented in the Final

Office Action mailed August 10, 2006, with the exception of some omissions and minor grammatical changes. Applicants' responses to those arguments were presented in Appellant's Brief, and will not be rehashed here. Instead, Applicants take this opportunity to address the substantive arguments made in the Examiner's Response to Argument.

(a) Claims 1, 11-13 and 15 are Not Obvious over U.S. Patent No. 6,601,705 to Molina in view of U.S. Patent No. 6,520,330 to Batra and International Publication No. WO 02/30347 to Farris.

The Examiner asserts that Swanson "teaches that the adhesive element can be in strips, and so the release paper would only cover the select areas of adhesive and not the entire outer cover of the pad" (Answer at 14-15). Applicants respectfully disagree with the Examiner's interpretation of Swanson. While the adhesive may be applied in strips, there is absolutely no teaching or suggestion in Swanson that the peel strip or wrapper 40 also is formed in strips. Indeed, just the opposite is true – Swanson discloses that the "wrapper 40 is associated with, and has dimensions generally larger than those of the catamenial pad 10" (Swanson at Col. 5, lines 30-60). Indeed, if the wrapper were also formed in strips, it would not function as a "wrapper" anymore, and would render Swanson inoperative for its intended purpose (*see* Swanson at Col. 2, lines 5-32; it is an object of Swanson to provide a wrapper "thereby providing an individually packaged disposable absorbent article," and further to provide an article "in which the wrapper overlays the adhesive element thereby eliminating the need to provide a release paper"). Moreover, one of ordinary skill in the art would not be motivated, or otherwise have a reason to provide a plurality of separate peel strips, as such a construction would require the end user to remove each strip, thereby complicating the process and risking contamination caused by the handling of the device.

Next, the Examiner misses the point with respect to Farris (*see* Answer at 12). In particular, Farris, as with Molina, does not disclose or suggest first *and* second indicia on both the product *and* the packaging (*see* Answer at 11 – Molina does “not expressly disclose that the indicator comprises a first and second characteristic.”) Rather, Farris teaches using a single color intensity for any one product (Farris at Abstract). As such, even if combined, Molina and Farris do not satisfy claim 1. Moreover, Applicants dispute that Farris expressly discloses that the visual indicator is in fact placed on an “outer cover,” which is not visible to the user, as asserted by the Examiner, since Farris emphasizes the use of such an indicator on products visible to the user (Farris at pages 10-12), just like Molina. As such, Farris does not provide the deficiency of Molina.

The Examiner also asserts that Batra teaches first and second characteristics on the article and on the packaging (Answer at 15). Applicants disagree – Batra teaches different indicia on the product and packaging (Col. 5, lines 62-64).

The Examiner also asserts that Batra teaches “associating characteristics of individual items with each other and with the container promotes aesthetic value” (Answer at 11), and therefore it would be obvious to modify the system of Molina to promote aesthetic value (Answer at 12). Likewise, the Examiner asserts that Molina and Batra “clearly seek to solve a similar problem in the art” (Answer at 15). Applicants respectfully disagree.

Molina is directed to providing information about the predetermined characteristics of a product (Molina at Col. 1, lines 42-64; Col. 4, lines 52-67; Col. 2, lines 54-58), and matching an indicator on the product with an identical indicator on the packaging (Abstract; Col. 2, lines 48-59). In sharp contrast, Batra discloses using *different* indicia on the product

and packaging, which would only obfuscate the relationship between the product and packaging (Batra at Col. 5, lines 62-64; Col. 6, lines 30-56), contrary to the intended purpose and operation of Molina.

(b) Claims 5-10 and 24 are Not Obvious over U.S. Patent No. 6,601,705 to Molina in view of U.S. Patent No. 6,520,330 to Batra and International Publication No. WO 02/30347 to Farris

The Examiner asserts that Batra teaches color change as a step in conversion of indicia, and that “one can physically stop the process at wherein the colors can feasibly be the same” (Answer at 16). Applicants submit that if “color” change is employed by Batra to convert a first indicia to a second indicia, then clearly Batra teaches against “stopping” such a change. Moreover, the Examiner’s arguments ignore that Batra fails to disclose or suggest first and second colors on *each* of the packaging and product components. The Examiner also does not dispute Applicants arguments about Molina teaching away from having two indicia on the *same* product and also on a packaging component.

(c) Claim 14 is Not Obvious over U.S. Patent No. 6,601,705 to Molina in view of U.S. Patent No. 6,520,330 to Batra and U.S. Patent Application Publication No. US 2002/0148749 to Briseboi

As admitted by the Examiner, Molina and Batra do not disclose that the “packaging component “comprises a wrapper element having the first characteristic and a fastening element having the second visual characteristic and releasably securing the packaging component in a closed configuration” (Answer at 10). However, as noted above with respect claim 22, the Examiner now also acknowledges that Briseboi also does not disclose this recitation. Indeed, the Examiner’s statements about Briseboi at page 10 (“Briseboi et al. disclose[s] a packaging system comprising first and second packaging component and further

disclose[s] that the components may comprise a wrapper element having the first characteristic and a fastening element having the second visual characteristic and releasably securing the packaging component in a closed configuration”) is inconsistent with the Examiner’s statement about Briseboi at page 4 (“Briseboi . . . does not teach that the first packaging component has a wrapper element with a first visual characteristic (e.g. 106 or 108) and that the fastener element has said second characteristic”). Applicants submit that the Examiner’s statement at page 4 is correct, as further acknowledged by the Examiner in withdrawing the anticipation rejection of claim 22 over Briseboi.

As such, the Examiner has failed to make out a prima facie case of obviousness since all of the elements of claim 14 are not disclosed or suggested by the cited references. Applicants further submit that there is no suggestion to modify Briseboi to provide a wrapper element having a first visual characteristic and a fastening element having a second visual characteristic for at least the reasons set forth above with respect to claim 22.

(d) Claim 16 is Not Obvious over U.S. Patent Application Publication No. US 2002/0148749 to Briseboi in view of U.S. Patent No. 6,520,330 to Batra and U.S. Patent No. 6,802,833 to Kudo

The Examiner asserts that Appellants have argued that the references fail to show certain features which are not recited in claim 16 (Answer at 17-18). The Examiner’s argument misses the point. Applicants were arguing that, when viewing the references as a whole, there is no suggestion, motivation or reason to combine Briseboi and Batra, and in particular, to modify the product of Briseboi by applying a visual characteristic on a product within a pouch, as purportedly taught by Batra (Answer at 7 and 18). In this way, it is

irrelevant whether the features or aspects of those references, which teach away from the suggested combination, are actually recited in the claims.

(e) Claims 17 and 23 are Not Obvious over U.S. Patent Application Publication No. US 2002/0148749 to Briseboi or U.S. Patent No. 6,601,705 to Molina in view of U.S. Patent No. 6,520,330 to Batra and U.S. Patent No. 6,802,833 to Kudo

The Examiner asserts that “the entirety” of Applicants arguments about the patentability of claims 17 and 23 over Briseboi in view of Batra and Kudo, or over Molina in view of Batra and Kudo, depend on prior arguments made with respect to claims 1 and 16 (Answer at 18-19). Applicants respectfully disagree. While claims 17 and 23 depend from claim 16, and are therefore patentable for at least the same reasons as claim 16, and, to the extent there is no suggestion to combine the same references, for at least the same reasons as claim 1, Applicants also presented other basis for patentability (Appellants’ Brief at 22-24).

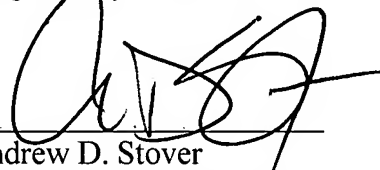
Moreover, by coordinating elements of the absorbent product, and/or by coordinating the absorbent product with the packaging, the manufacturer can use a relatively see-through packaging material, for example a relatively light basis weight non-woven material, *without* presenting a product that is easily recognized by others as an absorbent product (Specification at 1-3 and 17). In contrast, Kudo discloses just the opposite – the ability to ascertain the absorbent article through the sheet (Kudo at Col. 16, line 51 to Col. 17, line 9 (altering the packaging “so that the absorbent article can easily be confirmed visually”). As such, Kudo teaches against using the same first and second visual characteristics on the packaging component and on the product component, which would tend to obfuscate the contents of the package rather than ensuring that the product is easily recognizable, as taught by Kudo (*Id.*). Conversely, as set forth in Appellants’ Brief, the entire premise of Briseboi

and Molina is to provide a system wherein the user knows what the product is inside *without* having to open the individual package – which is just the opposite of Kudo. Therefore, not only do each of Briseboi, Molina and Kudo individually teach against the claimed invention, there also is no suggestion, motivation or any other reason to combine Briseboi, Molina and Kudo. Accordingly, claims 17 and 23 are patentable over the cited references.

CONCLUSION:

In summary, the cited references do not make obvious the inventions defined by the present claims. Accordingly, Appellants submit that the present inventions are fully patentable over the cited references, and the Examiner's rejections should be REVERSED.

Respectfully submitted,



Andrew D. Stover
Registration No. 38,629
Attorney for Appellant

BRINKS HOFER GILSON & LIONE
P.O. BOX 10395
CHICAGO, ILLINOIS 60610
(312) 321-4200